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No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION, PETITIONER

v.

ST. PAUL SURPLUS LINES INSURANCE CO., ET AL.,
RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS**

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QUESTIONS PRESENTED

Respondents are nationwide insurance companies that issued policies indemnifying petitioner Playtex against the risk of adverse judgments in product liability actions; the policies covered both compensatory and punitive damages. The insurance carriers commenced this preemptive action in Kansas state court seeking a declaratory judgment that they are not obliged to indemnify Playtex for a \$10 million punitive damages award entered in a product liability action litigated in Kansas federal district court. Neither Playtex nor any of the insurance companies is a Kansas resident, and it is undisputed that Kansas had no contacts with the negotiation, execution, or performance of the insurance contracts. Respondents nonetheless chose to commence this action in Kansas, apparently because insurance contracts covering punitive damages awards are unenforceable in Kansas. The Kansas courts asserted personal jurisdiction over Playtex, concluded that Kansas law applied, and held that respondents had no obligation to indemnify Playtex. The questions presented are:

1. Whether the Due Process Clause permits the Kansas courts to assert specific personal jurisdiction over Playtex in this action on the theory that the insurance companies' contract claim "arises out of or relates to" sales of Playtex products in Kansas.

2. Whether the Due Process Clause and the Full Faith and Credit Clause permit Kansas to apply its law in adjudicating this contract dispute solely because Kansas' public policy requires that result.

II

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Petitioner is the successor to International Playtex, Inc., and Playtex Family Products, Inc., which were the defendants below. Pursuant to Rule 28.1 of the Rules of this Court, petitioner states that its parent is Playtex PP Group Incorporated; its affiliates (other than wholly owned subsidiaries and affiliates) are M.L. Lee Acquisition Fund, L.P.; Drexel Burnham Lambert, Inc.; and Westinghouse Credit Corporation.

The respondents other than the respondent named in the caption are National Union Fire Insurance Co., International Insurance Co., Granite State Insurance Co., and AIU Insurance Co.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Playtex Family Products Corporation ("Playtex") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (App., *infra*, 1a-28a) is reported at 245 Kan. 258 and 777 P.2d 1259. The opinion of the state trial court (App., *infra*, 29a-41a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Kansas (App., *infra*, 42a-43a) was entered on July 14, 1989. On October 3, 1989, Justice White issued an order extending the time within which to file a petition for a writ of certiorari to and including November 11, 1989. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

2. The Full Faith and Credit Clause, Art. IV, § 1, provides, in pertinent part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

STATEMENT

Respondents, five nationwide insurance companies, instituted this action in Kansas state court seeking a declaration that insurance policies they had issued to Playtex did not obligate them to indemnify Playtex for a \$10 million punitive damages award entered against Playtex. Even though none of the parties to the insurance contracts is a Kansas resident and the contracts were not made or performed in Kansas, the Kansas courts asserted personal jurisdiction over Playtex, concluded that Playtex's rights under the insurance contracts were governed by Kansas law, and held that Playtex was not entitled to indemnification. This case presents the question whether this sweeping exercise of state power over a nonresident defendant is permissible under the Constitution.

A. The Insurance Policies

Playtex's predecessor in interest was an insured under indemnity insurance contracts issued by respondents in October 1982.¹ Each of these policies incorporated the following provision:

IT IS THE INTENTION OF THE COMANY [*sic*]
AND THE NAMED INSURED THAT PUNITIVE
AND EXEMPLARY DAMAGES BE FULLY IN-

¹ The insurance policies were issued to Esmark, Inc., which at the time was Playtex's parent corporation. App., *infra*, 6a.

SURED TO THE MAXIMUM EXTENT PERMITTED BY LAW SUBJECT TO THE LIMITS OF LIABILITY AS SET FORTH UNDER SECTION III OF THIS POLICY.

App., *infra*, 19a; see also *id.* at 7a. These policies covered a number of different risks, including the risk of adverse judgments in product liability actions. *Id.* at 6a, 35a-36a.

None of the insurance contracts was negotiated, entered into, or issued in Kansas. App., *infra*, 7a, 34a-35a. The Kansas Supreme Court acknowledged that "no activity took place in Kansas with regard to the formation of the insurance contracts." *Id.* at 11a. And none of the parties to the insurance contracts was or is a Kansas corporation; Playtex and its predecessors in interest are Delaware corporations and respondents are incorporated in Delaware and various other states. Indeed, Playtex is not even qualified to do business in Kansas. Finally, the contracts could not be performed in Kansas: indemnification payments to Playtex under the contracts were to be made in Delaware. R. VII, pp. 30-34, 50-52.

B. The O'Gilvie Litigation

In 1985, a jury sitting in the United States District Court for the District of Kansas found that Playtex had been "reckless" in failing to warn adequately of the possibility that a woman using its tampons might contract Toxic Shock Syndrome; the jury awarded \$1.525 million in compensatory damages and \$10 million in punitive damages. The district court remitted the punitive damages to \$1.35 million, but the Tenth Circuit (by a divided vote) reinstated the \$10 million award, and this Court denied review. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), cert. denied, 108 S.Ct. 2014 (1988). Shortly after certiorari was denied, Playtex paid the punitive damages portion of the judgment together with \$3 million in interest from its Dela-

ware headquarters. R. VII, pp. 30-31, 34, 50-52. Playtex's insurers paid the compensatory damages award and the interest thereon. The judgment in favor of the plaintiff in *O'Gilvie*, who was a Kansas resident, has thus been satisfied in full.

C. The Declaratory Judgment Action

Three months *before* this Court denied certiorari in *O'Gilvie*, and therefore three months before their duty to indemnify Playtex arose, respondents sought to avoid their obligation under the insurance contracts by filing this action in Kansas state court seeking a declaratory judgment that they were not required to indemnify Playtex for the punitive damages award. Recognizing that personal jurisdiction over Playtex might not be available in Kansas, respondents at the same time commenced an identical declaratory judgment action in Minnesota, where the home office of the lead carrier was located; that action was stayed pending the outcome of the Kansas litigation. App., *infra*, 5a.²

The Kansas trial court granted the relief requested by respondents on summary judgment, holding that Kansas public policy precluded enforcement of the insurance contracts. App., *infra*, 29a-41a. The trial court rejected the contention that it lacked personal jurisdiction over Playtex. The court stated that "this action for declaratory relief is one which lies in the wake of the commercial activities by which [Playtex] submitted to the jurisdiction of the Kansas courts" in the *O'Gilvie* tort action. App., *infra*, 39a. The court did not make any findings

² Playtex responded to these preemptive strikes by filing an action to enforce the insurance contracts in Delaware state court. Respondents opposed Playtex's motion for summary judgment in Delaware by arguing that there were issues of fact that required discovery. Shortly thereafter, respondents themselves sought—and obtained—partial summary judgment in the Kansas action. The Delaware court later stayed its proceedings pending the outcome of the Kansas litigation. App., *infra*, 5a-6a, 31a.

regarding the nature of Playtex's activities within Kansas.

The trial court further concluded that Kansas law should be applied to decide whether the insurance contracts could be enforced. Finding that "[i]t is a clearly expressed public policy of the State of Kansas that punitive damages for direct liability cannot be insured against," the court stated that the State's "interest in protecting its citizens" would be undermined if Kansas law were not applied to bar enforcement of the contracts. App., *infra*, 39a.

The Kansas Supreme Court affirmed. App., *infra*, 1a-28a. It held that personal jurisdiction over Playtex was authorized by the provision of the state long arm statute providing jurisdiction with respect to a cause of action arising from the "[t]ransaction of any business within this state." *Id.* at 9a (quoting K.S.A. § 60-308(b)(1) (1988 Supp.)). "The question of coverage arises from the actions taken by Playtex in selling its product in Kansas, which subsequently caused the death of a Kansas resident. The plaintiff insurers' claim for an insurance coverage determination lies in the wake of the commercial activities of Playtex in Kansas." *Id.* at 11a.³

The Kansas Supreme Court rejected Playtex's claim that Kansas' assertion of personal jurisdiction violated the Due Process Clause. App., *infra*, 12a-15a. Although the court below acknowledged that "no activity took place in Kansas with regard to the formation of the insurance contracts" (*id.* at 11a), it held that Playtex had "the requisite minimum contacts with the State of Kansas"

³ The state supreme court did not make any findings regarding the nature and extent of these "commercial activities." There was no evidence of any sales or advertising by Playtex in Kansas. In fact, Playtex does not directly engage in *any* commercial activities in Kansas. It sells its tampons from its Delaware factory to distributors who in turn sell the products in Kansas. App., *infra*, 8a.

because "Playtex knew that its tampons were distributed in Kansas" and thus that "[t]here was a product liability risk under the insurance policies arising from the sale of Playtex tampons in Kansas." *Id.* at 14a, 12a. Moreover, the court stated that "the State of Kansas has a significant policy interest justifying its assertion of personal jurisdiction over Playtex." *Id.* at 14a.

The Kansas Supreme Court also upheld the lower court's determination that Kansas law applied in adjudicating the merits of the insurers' claim. It held that Kansas public policy required the application of Kansas law. App., *infra*, 17a, 20a-22a, 24a. The court rejected Playtex's argument that the application of Kansas law violated the Due Process and Full Faith and Credit Clauses, again invoking the State's public policy against insurance of punitive damages. *Id.* at 17a-18a.

REASONS FOR GRANTING THE PETITION

This case involves a blatant example of successful forum shopping by preemptive strike. Respondent insurance companies—not the parties one would expect to initiate litigation in a dispute over an indemnification obligation, particularly in view of the fact that the judgment giving rise to the obligation had not yet become final—brought this action in Kansas state court in an obvious effort to gain the benefit of a Kansas legal rule favoring their position.⁴ The Kansas courts obliged, despite the absence of any meaningful connection between their State and this contract dispute, adopting an extremely broad view of their power to assert personal jurisdiction over

⁴ The logical forum for this litigation—Delaware, Playtex's state of incorporation, and the place where payment of the indemnity was to occur—has adopted the majority rule permitting insurance contracts covering punitive damages. See *Whalen v. On-Deck, Inc.*, 514 A.2d 1072, 1074 (Del. 1986).

a nonresident defendant and then apply Kansas law to the controversy.

This Court in recent years has repeatedly rejected such broad assertions of state power, holding that the Due Process Clause circumscribes the states' authority to assert personal jurisdiction over nonresident defendants and then apply their own law in determining those defendants' rights. See, e.g., *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The decision below promotes the very unfairness and unpredictability that these due process principles are designed to prevent and infringes upon federalism values as well: by arrogating to itself the right to decide which state's law should be applied to the transaction, and then picking its own law, the Kansas Supreme Court prevented other states that had a significantly greater relationship to the transaction, such as Delaware, from choosing the applicable law. The court's expansive view of its authority to subject nonresident defendants to specific jurisdiction thus worked in tandem with its expansive conception of the applicability of Kansas law to cause Playtex tremendous unfairness and increase Kansas' authority, while effecting a corresponding diminution in the power of Kansas' sister states.

Although the Kansas Supreme Court's decision is extreme in its view of state power, it is representative of the confusion in the lower courts regarding the proper scope of specific personal jurisdiction. These courts apply sharply divergent approaches in determining whether a plaintiff's claim is sufficiently related to the nonresident defendant's contacts with the forum to permit the assertion of jurisdiction; the conflicting approaches lead to inconsistent results. This Court should grant the petition to resolve the conflict among the lower courts and reaffirm the importance of the constitutional limitations upon state authority.

I. THE DUE PROCESS CLAUSE BARS THE KANSAS COURTS FROM ASSERTING PERSONAL JURISDICTION OVER PLAYTEX ON A SPECIFIC JURISDICTION THEORY, BECAUSE RESPONDENTS' CONTRACT CLAIM IS NOT SUFFICIENTLY RELATED TO PLAYTEX'S KANSAS CONTACTS

The states' authority to assert personal jurisdiction over nonresident defendants falls into two analytically distinct categories. "Specific jurisdiction" describes the states' power to assert personal jurisdiction over a defendant in connection with "a controversy [that] is related to or 'arises out of' a defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984). "General jurisdiction" describes the states' power to "exercise[] personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9.

This case concerns the constitutional limitations on a state's power to assert specific jurisdiction over a nonresident defendant. The Due Process Clause of the Fourteenth Amendment "operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants." *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978). The Court has sought in a number of decisions to define the "minimum contacts" between forum and defendant that the Due Process Clause requires before a state may subject a nonresident defendant to specific jurisdiction. See, e.g., *Asahi Metal Industry Co., supra*; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko, supra*; *Hanson v. Denckla*, 357 U.S. 235 (1958). But it has provided no guidance at all with respect to a closely related issue of critical importance—the nature of the connection between the plaintiff's cause of action and the defendant's contacts with the forum that the Due Process

Clause demands as the prerequisite for the exercise of specific jurisdiction.

Thus, although the Court has repeatedly remarked that a state may invoke specific jurisdiction only when the claim "arises out of or relates to" the defendant's contacts with the forum, it has never given content to that standard by applying it in a case in which there was a dispute about the sufficiency of the connection between the defendant's contacts with the forum and the subject matter of the lawsuit. Indeed, the Court only recently has reserved decision of that issue. See *Helicopteros*, 466 U.S. at 415 & n.10.

In the absence of guidance from this Court, the lower state and federal courts have adopted conflicting standards for determining whether the connection between the forum contacts and the cause of action is close enough to allow the assertion of specific jurisdiction over the defendant. And because the nature and quantity of contacts between defendant and forum necessary to support specific jurisdiction is much less than that needed to establish general jurisdiction, plaintiffs—and lower courts with a broad view of their own authority—have a considerable incentive to interpret the Due Process Clause as requiring only the loosest connection between the claim and the defendant's contacts with the forum. In that way, claims against defendants, like Playtex, that could not be subjected to a state's general jurisdiction may be shoe-horned improperly into the state's specific jurisdiction.

The present case is a textbook example of that unfortunate and unfair development. Applying an extremely expansive view of the scope of specific jurisdiction, the Kansas Supreme Court concluded that the presence of Playtex products in Kansas subjected Playtex to the jurisdiction of the Kansas courts in this contract action instituted by its insurance companies. Basing jurisdiction over a defendant in a *tort* action on sales of the defendant's product within the forum is supported by this

Court's cases, but we are aware of no due process precedent that justifies extending such specific jurisdiction beyond the immediate tort claim to encompass a *contract* claim, especially where, as here, the contracts at issue have no direct relationship to the sales of the defendant's products.

The issue in this case is of substantial practical importance to every company that engages in business across the United States. This Court should grant the petition for a writ of certiorari to resolve the conflict among the lower courts with respect to this issue and to determine whether the Due Process Clause permits such a broad expansion in the scope of specific jurisdiction.

A. The Kansas Supreme Court Adopted An Impermissibly Broad Definition Of Specific Jurisdiction That Is Inconsistent With This Court's Precedents.

In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), this Court considered a question related to the one presented here. *McGee* was a suit on an insurance contract; the issue before the Court was whether the defendant's contacts with California were sufficient to support personal jurisdiction with respect to the contract claim. The Court held that due process was satisfied only because "the suit was based on a contract which had substantial connection with [California]." 355 U.S. at 223. The Court observed that "[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Ibid.*; see also *Burger King*, 471 U.S. at 479-482 (looking to the relationship between the forum and the making and performance of the contract to determine whether the forum could assert specific personal jurisdiction over the nonresident defendant).

By contrast, when confronted with contract actions in which there was no direct relationship between the contract and the forum, this Court has held that due process

barred the forum from asserting specific jurisdiction over the nonresident defendant. In *Hanson v. Denckla, supra*, for example, the Court concluded that Florida could not subject a nonresident trustee to specific jurisdiction in an action to determine the validity of a trust agreement, because the agreement "was entered without any connection with the forum State"—it was executed outside the forum by residents of other states and performed in other states as well (357 U.S. at 252). See also *Kulko*, 436 U.S. at 97 (same).

The Kansas Supreme Court acknowledged that in this case, as in *Hanson* and *Kulko*, the forum had *no* contacts with the making of the contracts at issue. App., *infra*, 11a. It is undisputed that the contracting parties were not based in Kansas, that the contracts were not negotiated, issued, or delivered in Kansas, and that performance was not intended to occur in Kansas. The Kansas court held that the assertion of specific jurisdiction was nonetheless proper because respondents' contract claim "lies in the wake" of "the actions taken by Playtex in selling its product in Kansas." *Ibid*. The court's reliance on commercial activity that was in no way directly related to the insurance contracts stretches the concept of specific jurisdiction beyond any reasonable bounds.

The absence of any contacts between Kansas and the insurance contracts themselves makes clear that the decision in this case significantly expands specific jurisdiction beyond its previously recognized scope. It is one thing for sales of a defendant's products within a state to give rise to specific jurisdiction in tort actions involving injuries allegedly caused by those very products, or for contacts between the forum and a contract to permit the assertion of specific jurisdiction in an action involving a dispute over that very contract. But the nexus requirement is diminished to the point of triviality if product sales may be relied upon to support specific jurisdiction over the nonresident defendant in a contract action as to which

those product sales bear at most only an attenuated relationship.

This Court's decision in *Rush v. Savchuk*, 444 U.S. 320 (1980), strongly supports the conclusion that the Kansas Supreme Court stretched the concept of specific jurisdiction beyond the breaking point in this case. The issue in *Rush* was whether a state could obtain jurisdiction over an alleged tortfeasor based on the "presence" within the state of the insurance policy that provided the defendant with coverage for the automobile accident at issue. The Court held that jurisdiction could not be established on this basis. As the Court explained:

The insurance policy is not the subject matter of this case * * * nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.

444 U.S. at 329. Here, the insurance contracts *are* the subject matter of the case; indeed, they are the sole subject because the tort action has been resolved and the Kansas resident's interest in collecting the tort judgment has been fully satisfied. The facts underlying the tort claim—including the sales of Playtex products within Kansas—are irrelevant to "the substance[] of the litigation" and therefore do not "demonstrate ties between the defendant and the forum" (*ibid.*). *Rush's* insight that, for purposes of minimum contacts analysis, an insurance contract is not "related to the operative facts of the negligence action" is dispositive in this context as well.

The Kansas Supreme Court's contrary approach recreates the very *quasi in rem* jurisdiction that *Rush* held violative of due process. Instead of relying on the presence of an insurance "res" to justify jurisdiction over a nonresident defendant in a tort action, the Kansas court

has relied on a different, but equally unrelated, "res"—Playtex's products—to support jurisdiction over Playtex in this contract action.⁵

Moreover, under the Kansas Supreme Court's theory, *Hanson* and *Kulko* were wrongly decided, because in each case there were contacts between the forum and the dispute at least as significant as the contact relied on by the court below. Thus, in *Hanson* the defendant remitted trust income to Florida under the trust agreement that was the subject of the dispute, but the Court concluded that those actions were not sufficiently related to the agreement to permit Florida to assert jurisdiction over the trustee in an action unrelated to his payments. 357 U.S. at 252; see also *Kulko*, 436 U.S. at 95-97 (similar analysis). These decisions lend further support to the conclusion that Playtex's contact with Kansas is insufficient to support jurisdiction.

The constitutional invalidity of the Kansas Supreme Court's approach is further illuminated by considering the implications of its jurisdictional analysis. For example, if a California resident had an automobile accident in Kansas, his non-Kansas insurer would be able to institute a declaratory judgment action against him in Kansas in the event of a dispute over the interpretation of the non-Kansas insurance contract. Moreover, the implications of

⁵ The Kansas Supreme Court also noted (App., *infra*, 11a-14a) that the underlying tort action had been litigated in Kansas and that the punitive damages judgment had been entered in Kansas, as if those facts provided additional support for the determination that the contract claim arose in Kansas. But they cannot remedy the constitutionally defective connection between Kansas and this contract action. The presence of the *O'Gilvie* litigation in federal court in Kansas was the result of the decision of that *plaintiff* to commence that action there. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum." *Hanson*, 357 U.S. at 253; see also *Asahi*, 480 U.S. at 109-112 (plurality opinion); *World-Wide Volkswagen*, *supra*; *Kulko*, 436 U.S. at 93-94.

the Kansas court's decision are not limited to the insurance context. If a truck carrying goods from New York to California had an accident in Kansas, and the non-Kansas shipper and non-Kansas receiver could not agree as to who bore the risk of loss under the non-Kansas shipping contract, either could sue the other in Kansas under the contract simply because the accident occurred there. Similarly, Kansas could assert jurisdiction over a dispute regarding the insurance policy covering the shipped goods.

There simply is no warrant for such a wholesale expansion in specific jurisdiction. Rather, by departing from the relatively close connection between contact and cause of action that has characterized this Court's prior specific jurisdiction cases, the Kansas Supreme Court's decision "represents an unwarranted extension of [this Court's precedents] and would, if sustained, sanction a result that is neither fair, just, nor reasonable." *Kulko*, 436 U.S. at 92. Indeed, the decision below deviates sharply from this Court's precedents.

First, the Court has concluded that a forum may only assert jurisdiction over a nonresident defendant that has "purposefully availed" itself of the benefits of the forum's laws in conducting business there. See, e.g., *Hanson*, 357 U.S. at 253; *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). This trade-off becomes quite unfair where, as here, the legal claim bears only the most attenuated relationship to the defendant's in-forum activity. *Playtex did not avail itself of the protection of any Kansas laws regulating insurance contracts.*⁶ The parties to

⁶ The fact that the contracts covered risks in Kansas and contained certain endorsements required by Kansas law (see App., *infra*, 11a-12a) does not supply the requisite link to Kansas, because the contracts provided nationwide coverage and thus contained endorsements required by virtually every other state. The endorsements accordingly "can have no jurisdictional significance." *Rush*, 444 U.S. at 330; see also *World-Wide Volkswagen*, 444 U.S. at 298-299.

these contracts agreed to indemnification with respect to nationwide risks; no particularized benefits were sought from Kansas. Where that critical element is absent, this Court's decisions make clear that a nonresident defendant such as Playtex may not be subjected to personal jurisdiction. *Asahi*, 480 U.S. at 111-113 (O'Connor, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ.); *World-Wide Volkswagen*, 444 U.S. at 297-299; *Kulko*, 436 U.S. at 94 & n.7.

Second, the Due Process Clause requires "a degree of predictability * * * that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. When Playtex entered into the insurance contracts, it could not have reasonably expected that it could be haled before a Kansas court in a suit seeking an interpretation of the contracts. Permitting specific jurisdiction to rest on an attenuated connection between the forum and the cause of action, as the Kansas court did here, would eliminate all predictability in this area. A defendant would never know whether an act connected to a state might later be found tangentially related to some cause of action and therefore subject him to suit there on a wholly unforeseeable claim. This Court has rejected the "mechanical rule" that a seller's amenability to suit travels with the chattel (*World-Wide Volkswagen*, 444 U.S. at 296; see also *Asahi*, 480 U.S. at 111-113 (opinion of O'Connor, J.)), but the decision below rests squarely on that principle, allowing Playtex to be sued on virtually any claim in any state in which its products may be sold.

Third, the due process constraints on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States." *Hanson*, 357 U.S. at 251. Allowing a state to assert personal jurisdiction over a

defendant on the basis of a tangential relationship infringes upon the authority of other states that have a more direct connection with the contractual dispute. For example, Delaware, which is Playtex's state of incorporation and the state in which the contracts were to be performed, plainly has a much closer connection to the dispute. In sum, each of these policies weighs against the expansive approach adopted by the Kansas Supreme Court.

In reaching a contrary conclusion, the court below placed considerable emphasis (App., *infra*, 14a-15a) on Kansas' purported interest in effectuating its public policy regarding the availability of insurance covering punitive damages. As a threshold matter, because the plaintiffs are not Kansas residents, "[Kansas'] legitimate interests in the dispute have considerably diminished." *Asahi*, 480 U.S. at 114. Like the Supreme Court of California in *Asahi* (*ibid.*), the Kansas court claimed an interest in ensuring the deterrent effect of the Kansas tort judgment. But, as in *Asahi*, the dispute between Playtex and its insurers "is primarily about indemnification," because the judgment in favor of the plaintiff in *O'Gilvie* has been satisfied. *Ibid.* The amount of the punitive damages award, the stigma associated with such an award, and the fact that the award is likely to be reflected in increased insurance costs or the inability to obtain insurance at all, guarantees a significant deterrent effect. Cf. *id.* at 115. Kansas' interest in deterrence is accordingly quite remote here.

More importantly, the mere fact that Kansas might have an interest in the outcome of a particular legal dispute does not mean that Kansas may require a nonresident defendant to appear before its courts. This Court has repeatedly held that the existence of such a state interest is not sufficient to establish jurisdiction. See *World-Wide Volkswagen*, 444 U.S. at 294; *Kulko*, 436 U.S. at 98-100; *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977); *Hanson*, 357 U.S. at 254. The strength of a

state's policy interest is a factor to be considered *after* the contacts between the defendant and the forum have been found to have the constitutionally necessary connection with the plaintiff's cause of action. The Kansas Supreme Court's approach—allowing a policy interest to substitute for a relationship between the forum and the contracts at issue—is pure bootstrapping that permits circumvention of the due process limits on state authority.

B. The Lower Courts Have Adopted Conflicting Standards For Determining Whether A Particular Claim Arises Out Of Or Relates To The Defendant's Contacts With The Forum.

The Kansas Supreme Court's decision reflects a deep division among the lower courts over the proper scope of personal jurisdiction. The federal courts of appeals and state supreme courts have adopted at least two distinct approaches for determining whether—under the governing federal due process principles—a particular cause of action is sufficiently related to the defendant's contacts with the forum to permit the assertion of specific personal jurisdiction over the defendant. The conflict over this basic, and frequently recurring, issue of federal constitutional law plainly warrants this Court's attention.

Some courts have applied a lenient standard, most often characterized as a "but for" test, in assessing the sufficiency of the claim's connection to the forum: as long as the plaintiff can show that its claim would not have arisen but for the event that is connected to the forum, specific jurisdiction is permissible. *Third National Bank v. Wedge Group Inc.*, 882 F.2d 1087, 1091 & n.2 (6th Cir. 1989); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331-1332 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985); cf. *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442-444 (11th Cir. 1984) (construing similar requirement under Georgia long arm statute).

Other courts utilize a more restrictive standard; although their approach often is not formally denominated

a test, these courts clearly require a more substantial connection between the forum contacts and the plaintiff's claim. *Dollar Savings Bank v. First Security Bank*, 746 F.2d 208, 212-213 (3d Cir. 1984); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-322 (2d Cir. 1964); *Camelback Ski Corp. v. Behning*, 539 A.2d 1107, 1111-1112 (Md.), cert. denied, 109 S.Ct. 130 (1988); cf. *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) (interpreting similar language of Massachusetts long arm statute); *Pearrow v. National Life and Accident Insurance Co.*, 703 F.2d 1067 (8th Cir. 1983) (construing Arkansas long arm statute).

Some of the courts applying this restrictive standard have expressly adopted the "substantive relevance" test proposed by Professor Brilmayer. *State ex rel. La Manufacture Francaise des Pneumatiques Michelin v. Wells*, 657 P.2d 207, 210-211 (Or. 1982) (en banc); see also *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985); see generally Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77 (1980); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988). Under this approach, a contact counts for specific jurisdiction purposes only if the conduct of the defendant that gives rise to the contact is relevant in adjudicating the merits of the particular dispute.

For example, assume that A and B, both Virginia residents, are principals in a Virginia partnership that does business in Virginia. A is injured in an auto accident while on vacation in New York. B sues A in New York seeking damages for breach of the partnership agreement on the ground that, as a result of the accident, A sustained injuries that make him unable to carry out his partnership obligations. Virginia plainly would have a number of substantively relevant contacts with an action to enforce the partnership agreement, because the conduct

that occurred in Virginia bears great relevance to adjudication of the contract action. But the fact that A incurred his injury in New York would not give that state a substantively relevant contact with the contract dispute. The injury in New York would be a "but for" cause of the contract action—the dispute would not have arisen if the accident had not taken place—but, because the New York-related event has nothing to do with the merits of the contract action, the New York contact would not be substantively relevant. See Brilmayer, 101 Harv. L. Rev. at 1457-1458. Indeed, the "substantive relevance" standard is expressly designed to be more restrictive than the "but for" test. *Id.* at 1458, 1462-1463.

Simply reviewing the lower court decisions may mask this conflict somewhat: the inquiry is quite fact specific, and the courts often recite the particular case's facts without explaining the principle that guides the inquiry. But several courts and commentators have recently acknowledged the existence of different standards for assessing the sufficiency of the forum's link to the cause of action, recognizing that these disparate standards lead to differing results. See *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1443 (9th Cir. 1988);⁷ *Third National Bank*, 882 F.2d at 1091 n.2 (expressly rejecting the "substantive relevance" approach); see also *Helicopteros*, 466 U.S. at 426-427 & n.5 (Brennan, J., dissenting) (discussing different standards for scope of specific jurisdiction); Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 652 n.185, 662-663 & nn.230-235 (1988) (observing that some courts have adopted the substantive relevance test, while others have applied "a looser 'relatedness' standard" such as the "but for" test); Terez, *The*

⁷ Although the opinion in *Shute* was withdrawn pending the Washington Supreme Court's response to a certified question (see 872 F.2d 930 (1989)), that fact does not discredit the court of appeals' observation regarding the disparate approaches of the lower courts.

Misguided Helicopteros Case: Confusion in the Courts Over Contacts, 37 Baylor L. Rev. 913, 940-941 (1985) (discussing different standards).

The present case perfectly illustrates these different approaches. The Kansas Supreme Court explicitly applied a "but for" test. It concluded that jurisdiction was available because "if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurers." App., *infra*, 12a.

Under the more restrictive standard dictated by this Court's precedents and applied by other courts, however, the connection between the sale of Playtex products and this contract action would be deemed too attenuated to support specific jurisdiction. The product sales, while important to the tort action brought by the Kansas resident, are not sufficiently related to the insurance contract dispute to make the assertion of jurisdiction over that dispute fair or reasonable. See pages 10-17, *supra*. Moreover, it is clear that jurisdiction would not be available under the "substantive relevance" test. The sale of Playtex products in Kansas is one of the reasons that the contract dispute arose, but—like the New York accident in the hypothetical discussed above—the fact of those product sales has no bearing whatsoever on the legal rules governing the interpretation of the insurance contracts. The conflict among the lower courts is thus squarely presented in this case.

C. The Proper Scope Of Specific Jurisdiction Is An Important Issue That Should Be Addressed By This Court.

The proper scope of a court's authority to assert specific jurisdiction over a nonresident defendant is an important issue of federal constitutional law that warrants this Court's attention. To begin with, this Court's recent decision in *Helicopteros* gives plaintiffs a considerable in-

centive to fit their claims within the specific jurisdiction rubric. In view of the heavy burden that a plaintiff bears in showing that a defendant is subject to a state's general jurisdiction (see *Helicopteros*, 466 U.S. at 415-418), the advantage for a forum shopping plaintiff of being able to squeeze a claim within the specific jurisdiction category is obvious. Expansive decisions such as the decision below thus threaten to blur the critical distinction between specific and general jurisdiction and subject a non-resident defendant that has some minimal contacts with a forum to suit there on virtually any claim, no matter how attenuated the relationship between the contact and the particular claim.

This result is not only unfair; it also greatly expands the number of potential fora in which multi-state businesses are subject to suit and thus fosters the very sort of forum shopping that occurred here. As noted above, respondents rushed to file this action in Kansas, seeking a declaration that they had no obligation under the insurance contracts, even before their obligation to indemnify Playtex arose, in order to take advantage of the minority Kansas rule prohibiting insurability against punitive damages claims.⁸

⁸ The particular technique utilized by respondents in the present case—the filing, in a jurisdiction with a favorable legal rule, of a preemptive action by insurers seeking a declaration regarding their contractual obligations—is a rapidly growing phenomenon. See, e.g., *St. Paul Guardian Insurance Co. v. Johnson*, 884 F.2d 881 (5th Cir. 1989); *St. Paul Mercury Insurance Co. v. Duke University*, 670 F. Supp. 630 (M.D.N.C. 1987), aff'd in part and rev'd in part, 849 F.2d 133 (4th Cir. 1988); *United Services Automobile Ass'n v. Cregor*, 617 F. Supp. 1053 (N.D. Ill. 1985); *Safeco Insurance Company of America v. Miller*, 591 F. Supp. 590 (D. Md. 1984). Indeed, suits such as this can be anticipated whenever a punitive damages judgment is entered, and “[a]wards of punitive damages are skyrocketing.” *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2924 (1989) (O'Connor and Stevens, JJ., concurring in part and dissenting in part).

The due process limits on the states' power to subject nonresident defendants to personal jurisdiction guarantee fairness to litigants and safeguard the co-equal status of the states. The significant number of cases presenting personal jurisdiction issues that this Court has decided in recent years itself demonstrates the importance of these principles. The sweeping approach to specific jurisdiction adopted by the court below should not be permitted to take root without plenary consideration by this Court. The Court should grant the petition to resolve the conflict among the lower courts and to address the proper application of these principles to the present case.

II. THE KANSAS COURTS' CONCLUSION THAT THEY WERE ENTITLED TO APPLY KANSAS LAW IN DETERMINING WHETHER RESPONDENTS WERE OBLIGATED TO INDEMNIFY PLAYTEX FOR THE PUNITIVE DAMAGES AWARD SQUARELY CONFLICTS WITH THIS COURT'S DECISION IN *PHILLIPS PETROLEUM v. SHUTTS*

The adverse effects of the Kansas Supreme Court's overbroad conception of specific jurisdiction are not limited to the unfairness to Playtex and the unjustified intrusion upon the interests of other states. Having asserted jurisdiction, the Kansas court next decided which law to apply in adjudicating the contract dispute. Not surprisingly, the court placed its public policy thumb firmly on the scale and concluded that Kansas law applied.

This phenomenon is not unique to this case. All too often, a state court's expansive jurisdictional ruling leads inexorably to the application of that state's law. See *Rush*, 444 U.S. at 325 n.8; *Hanson*, 357 U.S. at 242-243. The fact that the forum will in most cases choose to apply its own law is yet another reason why states should not be permitted to assert specific jurisdiction on the basis of an attenuated relationship between the forum and the controversy.

Beyond that, the Kansas court's choice of law determination here constitutes independent constitutional error. The state court ignored the principles only recently set forth by this Court in *Phillips Petroleum Co. v. Shutts*, *supra*, a case that involved a similar supra-expansive application of Kansas law. The Court should grant the petition for a writ of certiorari with respect to this issue in order to further elucidate the principles established in *Shutts*.

To begin with, the Kansas Supreme Court's expressed rationale for its determination conflicts with this Court's decision in *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). The state court stated that its choice of Kansas law rested solely on public policy grounds: "Kansas will not apply the law of another state on the instant issue of insurance and punitive damages in contravention of Kansas public policy." App., *infra*, 24a. But this Court held in *Dick* that a state's power to enforce its public policy is constrained by the same due process standard that generally limits a state's ability to apply its own law. Thus, in recognizing a state's power to implement its public policy, the Court cautioned that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." 281 U.S. at 410.⁹

A contrary rule would be absurd, allowing a state to circumvent the due process limits on its authority simply by characterizing the particular legal rule as one undergirded by important "public policy." Kansas' ability to implement its public policy thus turns entirely upon

⁹ The Kansas Supreme Court cited *Dick* for the opposite proposition (see App., *infra*, 18a), ignoring the clear limitation imposed by this Court upon a state's power to implement its own public policy. Of course, the Kansas court's interpretation is impossible to square with *Dick* itself, which held that the Constitution barred the forum from applying its own law.

whether the Due Process Clause permits Kansas to apply its own law to this contract dispute.

Although the Kansas court did not undertake the latter inquiry, it is clear that the governing due process principle bars the application of Kansas law to the substantive contract law issues in this case. The relevant inquiry proceeds in two stages. First, it is necessary to "determine whether Kansas law conflicts in any material way with any other law which could apply." *Shutts*, 472 U.S. at 816. The Kansas rule barring enforcement of insurance policies providing indemnification for punitive damages awards is the minority rule among the states. Schumaier & McKinsey, *The Insurability of Punitive Damages*, 72 A.B.A.J. 68, 68 (March 1, 1986). One of the many states adhering to the majority rule that such contracts may be enforced is Delaware, which is Playtex's place of incorporation, the place of incorporation of one of respondent insurance companies, and the place where payment under the policies was to occur. See *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986). There is thus a "true" conflict among the state laws that could possibly apply to this dispute.¹⁰

The second step in the inquiry is determining whether the forum has a sufficient connection with the claims. "Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each * * * plaintiff * * *, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-822 (quoting *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-

¹⁰ The Kansas Supreme Court observed that one of the other possibly applicable legal rules—the Illinois rule—also would bar Playtex from enforcing the indemnification obligation. App., *infra*, 16a. But the court ignored *Shutts*' injunction to canvass "any other law which could apply" (472 U.S. at 816 (emphasis added)) in order to determine whether there is a true conflict.

313 (1981) (plurality opinion)).¹¹ Here, as in *Shutts*, no such significant contacts are present.

This Court has considered the constitutional validity of a forum's decision to apply its own law in five cases involving insurance coverage disputes, all of them actions brought by the insured party against the insurance company. See *Allstate Insurance Co.*, *supra*; *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936); *Dick*, *supra*. While the different posture of these cases makes it impossible to construct a precise analogy, it is highly relevant that in all of the cases in which the forum's decision to apply its law was upheld, the policy beneficiary was a resident of the forum or at least was injured there. See *Allstate Insurance Co.*, 449 U.S. at 318-319 (plurality opinion); *Clay*, 377 U.S. at 182; *Watson*, 348 U.S. at 72; compare *Yates*, 299 U.S. at 180, 182 (insured's residence in forum not by itself sufficient to allow forum to apply its own law); *Dick*, 281 U.S. at 408 (forum barred from applying its law where insured not actually resident in forum). That significant contact is lacking in this case.

In addition, "[w]hen considering fairness in this context, an important element is the expectation of the parties." *Shutts*, 472 U.S. at 822. This Court has accorded considerable significance to the fact that a defendant insurance company did business in the forum and therefore had reason to expect that the forum's law would be applied to its policies. See *Allstate Insurance Co.*, 449 U.S. at 317-318 (plurality opinion); *Clay*, 377 U.S. at 182. Here, given the absence of any direct connection between the insurance contracts and Kansas, Playtex had abso-

¹¹ This standard ensures compliance with the commands of both the Due Process Clause and the Full Faith and Credit Clause. *Shutts*, 472 U.S. at 819.

lutely no reason to anticipate that Kansas law would apply in the event of a coverage dispute. Kansas therefore may not apply its law over Playtex's objection. *Yates*, 299 U.S. at 182; *Dick*, 281 U.S. at 408.¹²

The Kansas Supreme Court stated that the fact that the dispute involved a punitive damages judgment entered under Kansas law gave Kansas an interest in barring enforcement of the insurance contract. App., *infra*, 17a, 20a-22a. But, as this Court recognized in *Shutts* (see 472 U.S. at 819-820), the existence of such a state interest in the absence of a direct contact between the forum and the transaction at issue (here, the insurance policies) is insufficient to justify the application of the forum's law.

The Kansas Supreme Court's clear error in applying this Court's precedents by itself justifies review of this aspect of the state court's decision. Plenary consideration of this issue will also give the Court an opportunity to apply the *Shutts* standard in a somewhat different context. In *Shutts*, there was absolutely no connection between Kansas and the non-Kansas oil and gas interests that were the subject of the litigation (472 U.S. at 822); the Court accordingly had no occasion to address the

¹² The contracts themselves provide additional evidence of the parties' expectations. Playtex argued below that the provision of the contracts providing coverage of punitive damages awards "to the maximum extent permitted by law" was a choice of law rule directing the selection of the state law that would permit enforcement of the contract; there is considerable evidence supporting this view. See R. IX, pp. 79-80; R. X, p. 118; R. XI, pp. 17, 29. But the Kansas trial court refused to permit Playtex to develop the record fully with respect to this issue. It recognized that there were "numerous and extensive disputes of fact with respect to the construction of the policy and the expectations of the parties," yet it concluded that the disputed facts were "not material" to its decision, because in its view Kansas public policy was determinative of the choice of law issue. App., *infra*, 38a; see also *id.* at 22a-24a (decision of Kansas Supreme Court upholding the trial court's determination).

- question whether even an extremely attenuated connection between the forum and the controversy gives the forum the constitutional authority to apply its own law. This case squarely presents that important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1989

APPENDICES

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE
OF KANSAS

No. 62,795

ST. PAUL SURPLUS LINES INSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
INTERNATIONAL INSURANCE COMPANY,
GRANITE STATE INSURANCE COMPANY, and
AIU INSURANCE COMPANY,
Appellees,

v.

INTERNATIONAL PLAYTEX, INC., and PLAYTEX
FAMILY PRODUCTS, INC.,
Appellants.

SYLLABUS BY THE COURT

1. K.S.A. 1988 Supp. 60-308(b), the Kansas long arm statute, is to be liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution.

2. When considering questions of personal jurisdiction, a two-step analysis is required. First, does the defendant's conduct fall within the scope of the relevant provision of the Kansas long arm statute? Second, does the exercise of personal jurisdiction in the particular case comply with the due process requirements of the Fourteenth Amendment?

3. There are three basic factors which must coincide if jurisdiction is to be entertained over a nonresident on

the basis of the transaction of business within the state. These are (1) the nonresident must purposefully do some act or consummate some transaction in the forum state; (2) the claim for relief must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice. Consideration is to be given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

4. The public policy of Kansas does not permit insurance coverage for punitive damages. Where an award of punitive damages is made in the State of Kansas pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages. A refusal to apply Kansas law on the issue of punitive damages would thwart the purposes for which the policy was adopted.

5. Personal jurisdiction is a question of law to be determined by the trial court.

6. Where a contract is found to be unambiguous, the written agreement determines the rights of the parties.

7. The burden on the party seeking summary judgment, K.S.A. 1988 Supp. 60-256, is a strict one. The appellate court scope of review in summary judgment cases is discussed and applied.

8. Under the facts of this case, our public policy analysis indicates that additional facts, yet to be discovered, which may suggest that Delaware law should be applied to this action are not relevant. Kansas will not apply the law of another state on the instant issue of insurance and punitive damages in contravention of Kansas public policy.

9. If a disputed fact, however resolved, could not affect the judgment, it is not a material fact so as to preclude summary judgment.

10. The function of the district court under K.S.A. 1988 Supp. 60-254(b) is to act as a dispatcher. The district court is to determine the appropriate time when each final decision in a multiple claims action is ready for appeal. The district court's discretion is to be exercised in the interest of sound judicial administration.

Appeal from Sedgwick district court; NICHOLAS W. KLEIN, judge. Opinion filed July 14, 1989. Affirmed.

Robert L. Howard, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Stephen M. Kerwick*, of the same firm, and *William J. McSherry, Jr.*, of Bryan, Cave, McPheters & McRoberts, of New York, New York, were with him on the briefs for appellant.

Philip L. Bowman, of Adams, Jones, Robinson and Malone, Chartered, of Wichita, argued the cause, and *Laura L. Ice*, of the same firm, and *Thomas P. Kane*, *Edward M. Laine*, *Bethany K. Culp*, and *Jonathon C. Bloomberg*, of Oppenheimer Wolff & Donnelly, of Saint Paul, Minnesota, were with him on the brief for appellee.

The opinion of the court was delivered by

SIX, J.: Defendants, International Playtex, Inc., and its successor in interest, Playtex Family Products, Inc., (referred to jointly as Playtex) appeal the trial court's holding that the public policy of the State of Kansas, as a matter of law, precludes Playtex from recovering \$10,000,000 from its excess insurers, the plaintiffs herein. The judgment of \$10,000,000 represents the amount of punitive damages assessed, in a products liability case, against International Playtex, Inc. *O'Gilvie v. Intern. Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985), *aff'd in part, rev'd in part* 821 F.2d 1438 (10th Cir. 1987), *cert. denied* — U.S. —, 100 L. Ed. 2d 601 (1988).

This declaratory judgment action involves horizontal federalism. We are required to review the relationship of Kansas to her sister states in the areas of personal jurisdiction and choice of law. The Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, section I, of the United States Constitution allocate power among the states to exercise personal jurisdiction and to apply state law.

The procedural vehicles of (1) partial summary judgment (K.S.A. 1988 Supp. 60-256) and (2) final judgment certification (K.S.A. 1988 Supp. 60-254[b]), exercised by the trial court in tandem, carry the appeal to this court. We find no error and affirm.

The specific issues for our review are: (1) Whether Playtex is subject to personal jurisdiction in Kansas; and (2) whether the trial court erred in (a) applying Kansas law to deny insurance coverage of the punitive damages award; (b) granting partial summary judgment; and (c) certifying the partial summary judgment as a final judgment pursuant to K.S.A. 1988 Supp. 60-254(b).

FACTS

Betty O'Gilvie died on April 2, 1983, of toxic shock syndrome. Her husband, Kelly O'Gilvie, brought an action against Playtex in the United States District Court for the District of Kansas. He alleged that the use of Playtex super-deodorant tampons caused her death and, therefore, Playtex was liable under the Kansas law of strict liability in tort. The jury attributed 80 percent of the total fault to Playtex and 20 percent to Betty O'Gilvie's physician, who was not a party to the lawsuit. Actual damages of \$1.525 million and \$10 million in punitive damages were awarded. Judgment was entered against Playtex for 80 percent of the total amount of the actual damages. The federal district judge granted a remittitur reducing the punitive damage award to \$1.35 million

based upon Playtex's agreement to remove certain types of the product from the market and to enhance the product's warning. 609 F. Supp. at 819.

Both parties appealed. The Court of Appeals for the Tenth Circuit affirmed the jury verdict against Playtex, but reversed the punitive damage remittitur. 821 F.2d at 1450. Playtex's petition for *certiorari* was denied.

The punitive award of \$10,000,000 and interest of approximately \$3,500,000 has been paid by Playtex.

Playtex's excess insurers sought a declaration from the trial court that: (1) they are not obligated to indemnify Playtex for the punitive damages in the *O'Gilvie* action, and (2) they are obligated to pay only the costs of the federal court appeal attributable to the compensatory damage award.

Shortly after two of the insurers filed this action in Kansas, Playtex brought a similar action against the insurers in Delaware. *Playtex Family Products, Inc. v. St. Paul Surplus Lines Insurance Company*, case No. 88C-FE-166, Superior Court of Delaware, New Castle County. Subsequently, the pleadings in this action were amended to include the same parties. Playtex contends that the law of Delaware should apply because Delaware is the state where the tampons were manufactured and Delaware is Playtex's principal place of business. The insurers moved for a stay of the Delaware proceedings pending the outcome of the Kansas action. The insurers anticipated that Playtex would contest Kansas jurisdiction and, consequently, also filed suit in Minnesota, where the policy of the lead carrier was issued. The Minnesota action has been voluntarily stayed in deference to this case.

The trial court ruled that it had both subject matter and personal jurisdiction over Playtex and that Kansas law should be applied to determine the outcome of the controversy. The trial court held that, because public policy of the State of Kansas prohibits a wrongdoer from

passing on the payment of punitive damage awards to insurance carriers, the plaintiff insurers are not obligated to indemnify Playtex for the punitive damage award assessed against Playtex in the *O'Gilvie* action. The trial court certified the partial summary judgment in favor of the insurers as a final judgment pursuant to K.S.A. 1988 Supp. 60-254.

On April 12, 1989, while this appeal was pending, the Superior Court of Delaware, New Castle County, Chandler, J., issued an opinion in case No. 88C-FE-166. The Delaware court addressed a motion by the insurers to dismiss based on res judicata, lack of ripeness, and failure to join indispensable parties. The Delaware court found that the question of the res judicata effect of the decision by the Kansas district court should be stayed pending our decision. The Delaware court dismissed the portion of Playtex's complaint seeking a declaration concerning the insurability of punitive damages and the application of Delaware law which might arise in cases other than *O'Gilvie*. We granted Playtex's Motion to include Judge Chandler's Opinion in the Record on Appeal in this action.

The Insurance Policies Involved

A summary of the insurance policies involved will provide background understanding for our analysis of the issues.

The policies do not contain any choice of law provision stating that the law of a specific state controls the resolution of coverage disputes.

International Playtex, Inc., and its successor in interest, Playtex Family Products, Inc., are subsidiaries of Esmark, Inc., the named insured on the policies at issue in this litigation. Esmark, Inc., contracted with the plaintiff insurance companies for excess comprehensive liability coverage for Esmark and its subsidiaries for the 1982 to 1983 policy year. Mission National Insurance Company

(Mission), which is not a party to this action, provided the first layer of excess coverage. Plaintiffs St. Paul Surplus Lines Insurance Company (St. Paul) and National Union Fire Insurance Company (National Union) provided the second layer of excess coverage on a pro rata basis.

The St. Paul policy was negotiated in California, issued in Minnesota, and delivered in Illinois. The National Union policy was issued in New York and delivered in Illinois, as was the plaintiff Granite State Insurance Company's (Granite State) policy.

National Union, Granite State, plaintiff International Insurance Company (International) and plaintiff AIU Insurance Company (AIU) shared the third layer of excess coverage on a pro rata basis. The International policy was negotiated and issued in California and delivered in Illinois. The AIU policy was negotiated, issued, and delivered in Illinois.

All the excess policies followed the terms of the Mission policy, which incorporated the terms of the underlying primary policy issued by Northwestern National Insurance Company.

When the verdict in the *O'Gilvie* action was rendered, Mission denied coverage for the punitive damage award and tendered payment for the compensatory award. Playtex rejected the tender and pursued its appeals. The coverage under the Mission policy was subsequently exhausted on other claims and Playtex notified the other excess carriers that it would expect those carriers to pay the punitive damage award and fund the *O'Gilvie* appeals.

Personal Jurisdiction

The trial court found that it had personal jurisdiction over Playtex pursuant to K.S.A. 1988 Supp. 60-308 (b) (1). In *Schlatter v. Mo-Comm Futures, Ltd.*, 233 Kan. 324, 333, 662 P.2d 553 (1983), this court said that

a trial court's determination that it had personal jurisdiction will be affirmed if there is personal jurisdiction under any of the provisions of the Kansas long arm statute (K.S.A. 1988 Supp. 60-308[b]). The plaintiffs (in this case, the insurers) carry the burden of proving the existence of personal jurisdiction over the defendant. 233 Kan. at 335.

We said in *Volt Delta Resources, Inc. v. Devine*, 241 Kan. 775, 777-79, 740 P.2d 1089 (1987):

"The Kansas long arm statute is liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the Fourteenth Amendment to the U.S. Constitution.

. . . .

"[W]hen considering questions of personal jurisdiction, a two-step analysis is required. First, does the defendant's conduct fall within the scope of the relevant provision of the Kansas long arm statute? Second, does the exercise of personal jurisdiction in the particular case comply with the due process requirements of the Fourteenth Amendment as set out in the decisions of the United States Supreme Court?"

Playtex admitted in its answer to the amended petition for declaratory judgment that:

"defendant IPI was a Delaware corporation until it was dissolved in December, 1986, that the parent corporation of IPI from October 1, 1982 to October 1, 1983 was Esmark, Inc. ('Esmark') which was at that time also a Delaware corporation and further . . . that at that time IPI and Esmark had their executive headquarters located in Stamford, Connecticut and Chicago, Illinois, respectively."

Playtex also admitted that, prior to its dissolution, IPI manufactured Playtex super deodorant tampons, which were sold and distributed throughout the United States, including the State of Kansas.

K.S.A. 1988 Supp. 60-308 (b) provides, in part:

"Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:

"(1) Transaction of any business within this state."

K.S.A. 1988 Supp. 60-308(b) (1) was interpreted by this court in *White v. Goldthwaite*, 204 Kan. 83, 88, 460 P.2d 578 (1969):

"From the foregoing cases it appears there are three basic factors which must coincide if jurisdiction is to be entertained over a nonresident on the basis of transaction of business within the state. These are (1) the nonresident must purposefully do some act or consummate some transaction in the forum state; (2) the claim for relief must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation"

The trial court relied on *United Services Auto. Ass'n v. Cregor*, 617 F. Supp. 1053 (N.D. Ill. 1985), which has also been cited by both parties. The Cregors had contracted with a Texas insurance company to insure their Illinois home. The Cregors moved to Hawaii. They also insured their Hawaii residence with the Texas company. They were subsequently sued for fraud and breach of

contract by the couple (the McNallys) who had purchased the Illinois residence. The Cregors tendered the defense of that lawsuit to the Texas insurer, who brought a declaratory judgment action to remove its responsibility to defend and to indemnify the Cregors. The Cregors argued that the Illinois court did not have personal jurisdiction over them in the declaratory judgment action because they were no longer Illinois residents. The Cregors contended that their Illinois contacts arose out of the fraud lawsuit and, therefore, were not sufficient to establish personal jurisdiction in the declaratory judgment case. The court did not agree.

"This declaratory judgment action requires the Court to determine whether coverage exists to protect the Cregors in the McNally's underlying suit. If such coverage exists, it will flow from the policy which insured the Cregors' Wilmette, Illinois home. Consequently, if coverage exists under the policy, it will arise out of actions taken by the Cregors in relation to their Wilmette, Illinois home and the sale of it." 617 F. Supp. at 1055.

Playtex advances an argument similar to that of the Cregors. Playtex contends that, although the federal court in Kansas had jurisdiction over the original *O'Gilvie* action pursuant to K.S.A. 1988 Supp. 60-308(b)(7)(B) (product liability), jurisdiction cannot extend to a declaratory *contract* action where there was no connection with Kansas in the creation of the contract. The Cregors had been Illinois residents at the time the insurance contract was signed and the policy specifically insured Illinois property. The federal district court found that the Cregors had transacted business in Illinois. In the case at bar, none of the parties are Kansas residents and no business with regard to the negotiation of the insurance contracts was conducted in Kansas. Betty O'Gilvie, the insured risk, however, was located in Kansas.

Playtex argues that the current claim does not arise out of the use of its products sold in this state, but rather out of an insurance contract between nonresident corporations which have no connection to the State of Kansas.

K.S.A. 1988 Supp. 60-308(b) is to be liberally construed. It was not error for the trial court to find that the declaratory judgment action was sufficiently connected to the sale of Playtex products in Kansas to warrant personal jurisdiction over Playtex. The declaratory judgment action requires us to determine whether coverage for punitive damages exists to protect Playtex in the underlying *O'Gilvie* damage action. The question of coverage arises from the actions taken by Playtex in selling its product in Kansas, which subsequently caused the death of a Kansas resident. The plaintiff insurers' claim for an insurance coverage determination lies in the wake of the commercial activities of Playtex in Kansas. As the Tenth Circuit observed in *O'Gilvie*:

"Punitive damages are imposed under Kansas law for 'a willful and wanton invasion of the injured party's rights, the purpose being to restrain and deter others from the commission of like wrongs.' *Wooderson [v. Ortho Pharmaceutical Corp., 235 Kan. 387,] 681 P.2d [1038,] at 1061 [, cert. denied 469 U.S. 965 (1984)]* (quoting *Cantrell v. Amarillo Hardware Co., 226 Kan. 681, 686, 602 P.2d 1326, 1331 (1979)*)." *O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987)*.

The punitive damage award resulted from the application of Kansas law.

Although no activity took place in Kansas with regard to the formation of the insurance contracts, the parties anticipated that claims under the policies might arise in the State of Kansas. The automobile liability portion of the insurance policies includes endorsements to comply with the requirements of the Kansas Automobile Injury

Reparations Act (K.S.A. 40-3101 *et seq.*) and the Kansas Financial Security Act (K.S.A. 1988 Supp. 40-3104[a]). The policies contain a number of provisions designed to comply with various insurance laws and regulations of many different states.

Playtex knew that its tampons were distributed in Kansas. There was a product liability risk under the insurance policies arising from the sale of Playtex tampons in Kansas.

Playtex cites *Land Manufacturing, Inc. v. Highland Park State Bank*, 205 Kan. 526, 470 P.2d 782 (1970), in support of its argument that there is not a sufficient connection between the business activities of Playtex in Kansas and the insurers' declaratory judgment claim. In *Land Manufacturing*, the plaintiff had recovered a default judgment against the defendant, Highland Park State Bank. A year later, the plaintiff instituted garnishment proceedings against Chase Manhattan Bank based on the default judgment. Chase Manhattan argued that the district court lacked personal jurisdiction over it. Although Chase was transacting business in Kansas, its business activities in Kansas were unrelated to the underlying dispute between Land Manufacturing and Highland Park State Bank. In the instant action, if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurers.

Playtex asserts that in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984), the United States Supreme Court held that contractual activities in a state that would be sufficient to create jurisdiction in a contract action are insufficient to create jurisdiction in an unrelated tort action. *Helicopteros* was a wrongful death action which arose out of a helicopter crash in Peru. Four United States citizens who were employees of a Houston-based company working on a pipeline project in Peru were killed in the

crash. The representatives of the decedents brought suit in Texas against the company owning the helicopter.

Playtex's reliance on *Helicopteros* is misplaced.

The Court in *Helicopteros* did not find that the contractual activities of Helicol would be sufficient to subject Helicol to jurisdiction in a contract action. The Court noted that some negotiations on the contract were conducted in Houston, but that the contract was signed in Peru, was written in Spanish, and stated that any controversies arising out of the contract would be submitted to the jurisdiction of the Peruvian court. All the parties in the case conceded that their claims against Helicol did not arise out of, or were they related to, Helicol's activities in Texas.

"Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." 466 U.S. at 414.

Playtex also cites *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987). In *Asahi*, a California resident brought a product liability action in California against the manufacturer of a tire tube. The plaintiff had been severely injured and his wife killed in a motorcycle accident. He alleged the accident occurred because of a sudden loss of air and explosion in the rear tire of the motorcycle brought on by a defective tire, tube, and sealant. Cheng Shin Rubber Industrial Co., Ltd., the Taiwanese tube manufacturer, filed a cross-complaint against Asahi, the Japanese manufacturer of the tube's valve assembly. The plaintiff ultimately settled with Cheng Shin, leaving only the issue of indemnification between Cheng Shin and Asahi. Asahi's sales of tire valve assemblies to Cheng Shin took place in Taiwan.

The United States Supreme Court found that the mere act of placing a product into the stream of commerce was not sufficient to support a finding that Asahi had purposefully directed its actions toward the State of California. The court addressed the issue of California's interest in the contract indemnification claim:

"The Supreme Court of California argued that the State had an interest in 'protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards.' [Citation omitted.] The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards. Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan." 480 U.S. at 114-15.

The facts in *Asahi* and the language of the opinion characterize it as an international case involving a choice of an inconvenient forum by Cheng Shin in which to assert its indemnification claim against Asahi.

In the present case, not only does Playtex have the requisite minimum contacts with the State of Kansas, but the State of Kansas has a significant policy interest justifying its assertion of personal jurisdiction over Playtex.

The public policy of Kansas does not permit insurance coverage of punitive damages. *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973); *Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co.*, 228 Kan. 532, 618 P.2d 1195 (1980). There was no such overriding California public policy concern in the indemnification claim between Asahi and Cheng Shin.

Where an award of punitive damages is made in Kansas, pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages.

Playtex purposefully advertised and sold its tampons in Kansas. Playtex initiated the interstate activity giving rise to the insurers' declaratory judgment claim. Playtex profited from its activity in Kansas. Playtex had fair warning that it might be subject to suit in Kansas. In fact, Playtex has already defended itself in a lawsuit arising from these facts in Kansas.

"Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum [citation omitted], and the litigation results from alleged injuries that 'arise out of or relate to' those activities [citation omitted]." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

Playtex possessed certain minimum contacts with Kansas, so that it was "'reasonable and just, according to our traditional conception of fair play and substantial justice,'" for Kansas to exercise personal jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807, 86 L. Ed. 2d 628, 105 S.Ct. 2965 (1985).

The trial court had personal jurisdiction over Playtex in this action.

2. Choice of Law

Playtex advances *Simms v. Metropolitan Life Ins. Co.*, 9 Kan. App. 2d 640, 685 P.2d 321 (1984), to support its argument that the trial court erred in applying Kansas law to an extraterritorial insurance contract. In *Simms*, the plaintiff, a Kansas resident, received group health

insurance through her employer, headquartered in Tennessee. The group policy had been delivered to the employer in Tennessee. The employer distributed certificates of coverage to its employees. A dispute arose between the plaintiff and the insurer over coverage for alcohol rehabilitation of her dependent son. The policy provided for limited coverage for such care. The applicable Kansas statute mandated broader coverage.

The Court of Appeals said, "Although the statute does not state its intended geographic reach, we cannot conceive that the legislature intended to attempt to regulate insurance contracts made outside this state." 9 Kan. App. 2d at 642. The court discussed Kansas choice of law principles for the construction of contracts and determined that the law of the state where the contract is made controls construction. *Simms* also stated that a contract is made when the last act necessary for its formation is completed. The law of the state where the master policy is delivered governs where a group insurance policy is involved. 9 Kan. App. 2d at 644.

The insurers in the instant case argue that *Simms* is distinguishable because it involved a legislative enactment, not a general public policy prohibition. Even if *Simms* were applicable to the facts in this case, Playtex's choice of law position is not strengthened. Playtex seeks to have Delaware law govern the instant insurance contracts because Delaware allows insurance for punitive damages. *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986). If, however, *Simms* controls the choice of law issue, Illinois law would govern the interpretation of the insurance contracts. Not only were the policies delivered to Playtex's parent corporation, Esmark, in Illinois, but also other substantial activity in the formation of the contracts occurred there. Illinois public policy prohibits insurance against liability for punitive damages arising out of the insured's misconduct. *Beaver v. Country Mutual Insurance Co.*, 95 Ill. App. 3d 1122, 1125, 420 N.E. 2d 1058 (1981).

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 816, the United States Supreme Court stated: "There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit."

The Plaintiff in *Barbour v. Campbell*, 101 Kan. 616, 168 Pac. 879 (1917), sued for breach of an oral promise. The contract had been made in Idaho, where it was enforceable under the statute of frauds. The contract, however, was not enforceable under the Kansas statute of frauds. The court said:

"Ordinarily a contract which is valid where made is valid everywhere, but there is a well-known exception to that rule. Briefly stated, the exception is that where the contract contravenes the settled public policy of the state whose tribunal is invoked to enforce the contract, an action on that contract will not be entertained." 101 Kan. at 617.

See *Dow Chemical Corp. v. Weevil-Cide Co., Inc.*, 630 F. Supp. 125 (D. Kan. 1986); *Dickson v. Hoffman*, 305 F. Supp. 1040 (D. Kan. 1969).

Certain states have now abandoned the *lex loci* rule in favor of the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws § 188 (1969). See, e.g., *Amer. Home Assur. v. Safway Steel Prod.*, 743 S.W.2d 693 (Tex. App. 1987); *Crown Center v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348 (Mo. App. 1986).

We reserve consideration of the Restatement's "most significant relationship" test for a later day. Our choice of Kansas law rests on Kansas public policy. The interest of Kansas exceeds Delaware's interest in the resolution of the instant controversy.

Playtex relies upon opinions of the United States Supreme Court in support of its argument that the interests

of other states outweigh the interests of Kansas in this litigation. Our review of the controlling choice of law cases supports the application of Kansas law in the instant case.

Home Ins. Co. v. Dick, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338 (1930), held that Texas law could not apply to an insurance policy between a Texas citizen and a Mexican insurer. However, the court specifically found that at all relevant times the insured was living in Mexico, and the boat which was insured was in Mexican waters at all times, including the time of the accident. No acts relating to the negotiation or performance of the insurance policy occurred in Texas. The Court said, "Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and under some circumstances, it may refuse to aid in the enforcement of such rights." 281 U.S. at 410.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 66 L. Ed. 2d 521, 101 S. Ct. 633 (1981), involved a Wisconsin auto accident between two Wisconsin residents. The accident occurred in Pierce County, Wisconsin, which is close to the border of Minnesota. The insured/decedent lived in Wisconsin, but worked in Minnesota. He was not traveling to work at the time of the accident. His wife, as personal representative of his estate, brought an action in Minnesota against his insurer. Shortly after the accident, the wife had moved to Minnesota. Minnesota law permitted stacking of uninsured motorist benefits; Wisconsin law did not. The Court found that the choice of Minnesota law by the Minnesota court did not violate the Due Process Clause or the Full Faith and Credit Clause. 449 U.S. at 320.

Allstate endorses the choice of Kansas law in the current dispute.

Playtex argues that the application of Kansas law to the insurance policies in question would frustrate the

intent of the parties. The clause of the insurance contract which is at issue states the following:

"IT IS THE INTENTION OF THE COMANY [sic] AND THE NAMED INSURED THAT PUNITIVE AND EXEMPLARY DAMAGES BE FULLY INSURED TO THE MAXIMUM EXTENT PERMITTED BY LAW SUBJECT TO THE LIMITS OF LIABILITY AS SET FORTH UNDER SECTION III OF THIS POLICY." (Mission National Insurance Co. general condition "S.")

The wording of the Playtex policy is not ambiguous. The clause regarding punitive damage states that such damages will be covered to the extent permitted by law. One of the trial court's findings of fact was:

"39. The second layer excess carriers have denied coverage for punitive damages only in those situations where the bodily injury or death occurred in a state where punitive damages are uninsurable as a matter of public policy."

The Playtex coverage was designed to insure a number of possible risks throughout the United States, including those in the State of Kansas. The provisions of the policies which are designed to comply with the various automobile insurance requirements of different states, including Kansas, indicate that the parties intended the policies to have effect wherever liability might arise. "Whether an ambiguity exists in a written instrument is a question of law to be decided by the court." *Kennedy & Mitchell, Inc. v. Anadarko Prod. Co.*, 243 Kan. 130, 133, 754 P.2d 803 (1988).

Where a contract is found to be unambiguous, the written agreement determines the rights of the parties. *Kennedy*, 243 Kan. at 135. The insurance policies involved were not ambiguous. It was not necessary for the trial court to consider additional evidence in construing the meaning of the contract.

In its reply brief, Playtex emphasizes the fact that the present case is an action for a declaratory judgment, not a direct action to enforce an insurance contract. Playtex argues that it has paid the punitive award as a result of the *O'Gilvie* judgment and does not seek to enforce the insurance contract in Kansas. Playtex reasons that, because it has already paid the punitive damages, the insurers are now obligated to indemnify Playtex in its state of incorporation, Delaware. The punitive damages, however, were awarded by a federal court in Kansas, pursuant to Kansas law, to a Kansas citizen, to punish conduct that occurred in Kansas.

In *Crown Center v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348, the insurers brought a declaratory judgment action to determine which of the insurers had the duty to defend Hyatt Corporation for claims arising out of the collapse of the skywalks at the Hyatt Regency Crown Center. Two of the insurers argued that Illinois law should apply because both the insurance companies and Hyatt Corporation were Illinois corporations and the insurance contracts were made in Illinois. The Missouri Supreme Court held that the law of the state in which the insured risk was located should control. 716 S.W.2d at 359.

In the Playtex companion Delaware action, the Delaware court refused to make a finding that Delaware law, not the law of the state where Playtex's activities caused injury, would control in determining who should pay punitive damages. The Delaware court also noted that Delaware has adopted the choice of law approach of the Restatement (Second) of Conflict of Laws § 188.

If we were to refuse to apply Kansas law on the issue of punitive damages, we would thwart the purposes for which the policy was adopted.

“Where exemplary damages are awarded for purposes of punishment and deterrence, as is true in this

state, public policy should require that payment rest ultimately as well as nominally on the party who committed the wrong; otherwise they would often serve no useful purpose. The objective to be attained in imposing punitive damages is to make the culprit feel the pecuniary punch, not his guiltless guarantor." *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. at 405.

The objective of the policy is to prevent wrongful acts against citizens of the State of Kansas. Here, a Kansas citizen died as a result of the misconduct of Playtex. The jury in the *O'Gilvie* case made the following specific findings:

"8. Did International Playtex know, or should it have known, of the increased risk of developing toxic shock syndrome when using Playtex super deodorant tampons at the time of the death of Betty O'Gilvie?

"Yes X No

"9. Was the failure of International Playtex to adequately warn about the increased risk of toxic shock syndrome with the usage of Playtex super deodorant tampons a reckless disregard by International Playtex of the consequences of its acts?

"Yes X No " 609 F. Supp. at 818.

A finding that Kansas public policy does not apply to the punitive damages in the *O'Gilvie* action would effectively excuse Playtex from the consequences of its reckless behavior within this state. Failure to apply Kansas law would establish an undesirable precedent for other tort and product liability actions. In any product liability action which involves an out-of-state manufacturer, the manufacturer could avoid the application of Kansas public policy where the manufacturer had contracted outside the State of Kansas for insurance of punitive damages. This would result in the uneven application of the public

policy. Kansas tortfeasors would be required to feel the "pecuniary punch" while out-of-state tortfeasors could require their "guiltless" insurance companies to pay such damages. Out-of-state tortfeasors who contracted with out-of-state carriers would, therefore, not be subject to deterrence for committing reckless acts in Kansas.

We affirm the trial court's choice of Kansas law.

Partial Summary Judgment

The trial court sustained the plaintiff insurers' motion for partial summary judgment. A prologue to any analysis of a summary judgment issue is the recitation and acknowledgment of the movant's burden and of our scope of appellate review.

"The burden on the party seeking summary judgment is a strict one. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. On appeal we apply the same rule, and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citation omitted]. The party opposing summary judgment, however, has the affirmative duty to come forward with facts to support its claim, although it is not required to prove its case. [Citations omitted]. If factual issues do exist, they must be material to the case to preclude summary judgment." *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 306-07, 756 P.2d 416 (1988).

Playtex points to "numerous controverted facts" connecting the parties to the State of Delaware. The trial court found that Playtex's Delaware assertions were not material to its decision. Personal jurisdiction is a question of law to be determined by the trial court. Our analysis of the personal jurisdiction issue indicates that the

record established a sufficient nexus between the State of Kansas and Playtex to permit the assertion of personal jurisdiction over Playtex. Whatever ties Playtex has to Delaware are noted, analyzed, and characterized as secondary to the issue of the personal jurisdiction of Playtex in the Kansas courts.

Playtex contends that summary judgment was improper because factual issues regarding the intentions of the parties as to the meaning of the punitive damage clause of the insurance policies were in dispute. A reading of Playtex's answer to the motion for partial summary judgment indicates that most of the insurers' contentions of fact were uncontroverted by Playtex. The trial court specifically found that the contraventions of fact made by Playtex were not material to the issues to be determined in the partial summary judgment. A review of the record supports the trial court's ruling.

The insurance contracts in issue stated that punitive damages would be insured to the maximum extent allowed by law. Kansas law prohibits the insurance of punitive damages; therefore, under the express terms of the contract, punitive damages arising out of Kansas litigation would not be covered.

In its journal entry of partial summary judgment, the trial court said:

"This controversy arises out of injuries in Kansas suffered by a Kansas resident resulting in her wrongful death. Providing for the award of punitive damages in civil actions is a significant method by which this state protects its citizens. This state's interest in protecting its citizens and its duty to protect its citizens is of the highest order. This interest would be undermined if Kansas law were not applied to the question presented in this action."

The analysis of the choice of law issue also indicates that the trial court had sufficient facts to determine that

Kansas law should apply to the litigation. Playtex indicates that, had it been able to complete its discovery, it could have shown that the choice of Delaware law was the proper choice in this litigation.

This court has held that, ordinarily, a motion for summary judgment should not be sustained so long as discovery is incomplete. *Beck v. Kansas Adult Authority*, 241 Kan. 13, 26-27, 735 P.2d 222 (1987).

Our public policy analysis indicates that additional facts, yet to be discovered, which may suggest that Delaware law should be applied to this action are not relevant. Kansas will not apply the law of another state on the instant issue of insurance and punitive damages in contravention of Kansas public policy. "If a disputed fact, however resolved, could not affect the judgment it is not a material fact so as to preclude summary judgment." *In re Estate of Messenger*, 208 Kan. 763, Syl. ¶ 4, 494 P.2d 1107 (1972).

A Final Judgment Subject to Appeal

K.S.A. 1988 Supp. 60-254 (b) states:

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim or, when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The trial court specifically found that the issues relating to the liability for punitive damages were unrelated to the remaining issues in this litigation and certified the ruling on the motion for partial summary judgment as a final judgment under K.S.A. 1988 Supp. 60-254.

The plaintiff insurers' second claim for relief, which has not yet been adjudicated, seeks a declaration that the

insurers are liable for the expenses of the appeal of the O'Gilvie action only to the extent that they challenged the award of compensatory damages.

A certification pursuant to K.S.A. 1988 Supp. 60-254 (b) must contain an express determination that there is no just reason for delay and an express determination that the entry of judgment is a final judgment. *City of Salina v. Star B, Inc.*, 241 Kan. 692, 695, 739 P.2d 933 (1987). The trial court's entry of judgment met these two requirements. Because Fed. R. Civ. Proc. 54(b) is identical to K.S.A. 1988 Supp. 60-254(b), Kansas has followed the federal cases interpreting 54(b) certifications. 241 Kan. at 695.

Playtex contends the claim that remains below is between the same parties and predicated on the same insurance contracts; consequently, the trial court erred in certifying the partial summary judgment as a final judgment. Playtex cites *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 47 L. Ed. 2d 435, 96 S. Ct. 1202 (1976), in support of its contentions. In *Liberty*, the United States Supreme Court held that a 54(b) certification was improper where the plaintiff's complaint advanced a single legal theory which was applied to only one set of facts. 424 U.S. at 743.

In *Henderson v. Hassur*, 1 Kan. App. 2d 103, 562 P.2d 108 (1977), a number of claims, counterclaims, and cross-claims were asserted out of a contract for the building and operation of Pizza Hut franchises in Mexico. The trial court granted partial summary judgment on some of the claims, but reserved the issues of punitive damages and cross-claims between the two plaintiffs. The Court of Appeals found that the trial court had not issued a 54(b) certificate as required by the statute. The court held that, even had the trial court issued the certificate, the remaining counterclaim was so closely related to the claims disposed of in the partial summary judgment that

disposition of both was required for a final decision. 1 Kan. App. 2d at 111.

The issue of whether the insurers were liable for punitive damages is intertwined with the issue of whether the insurers would be required to fund the appeal from those punitive damages. The insurers argue, "The resolution of this issue and certification of the appeal has served to expedite the conclusion of this dispute and precluded the Defendants from relitigating this issue and undermining the public policy of this state in the Delaware action." We agree.

The insurers cite *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 64 L. Ed. 2d 1, 100 S. Ct. 1460 (1980). In *Curtiss-Wright* the Supreme Court granted *certiorari* in order to examine the use of 54(b) as a procedural device:

"The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the inter-relationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such judicial concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is 'the one most likely to be familiar with the case and with any justifiable reasons for delay.' [Citation omitted.] The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable." 446 U.S. at 10.

The Court in *Curtiss-Wright* endorsed its observation made in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435, 100 L. Ed. 1297, 76 S. Ct. 895 (1956), that the function of the district court under the Rule is to act as "dispatcher." The district court is to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. The district court's

discretion is to be exercised "in the interest of sound judicial administration." *Curtiss-Wright*, 446 U.S. at 8.

We adopt the *Curtiss-Wright* rationale as the correct one to invoke for a K.S.A. 1988 Supp. 60-254(b) determination.

Litigation on the same matters was pending in the state courts of Delaware and Minnesota at the time partial summary judgment was entered in this case. The concept of efficient judicial administration would be served by allowing this court to determine the personal jurisdiction and choice of law issues before the case advanced further. The Delaware court has indicated that it is waiting for this court's determination of the personal jurisdiction issue. The Minnesota action is stayed, pending this decision. Our adjudication of the issue of plaintiff insurers' nonliability for punitive damages will effectively dispose of the issue of the insurers' liability for the expenses of the federal court appeal of punitive damages.

Certification will not result in unnecessary appellate review.

The claims of jurisdiction and choice of law will not be mooted by any future developments in the case. This court will not have to decide these two issues more than once.

We agree with the observation of the insurers that any issues relating to the allocation of costs of the federal appeal are fact specific.

The Playtex Counterclaim—The Insurers' Motion

The insurers have advanced the argument that, because Playtex filed a counterclaim, characterized by Playtex as contingent, it waived jurisdiction.

The trial court specifically declined to decide or make any conclusions of law with respect to whether the coun-

terclaim is "a compulsory counterclaim, contingent counterclaim or whether it is a counterclaim at all."

The insurers have filed a motion to strike Appendix A of the Playtex brief and portions of the record on appeal, including arguments based thereon.

In view of our disposition of the appeal it is not necessary to consider either the "counterclaim question" or the insurers' motion.

Affirmed.

APPENDIX B

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

Case No. 88 C 463

ST. PAUL SURPLUS LINES INSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
INTERNATIONAL INSURANCE COMPANY,
GRANITE STATE INSURANCE COMPANY,
and AIU INSURANCE COMPANY,
Plaintiffs,

vs.

INTERNATIONAL PLAYTEX, INC. and PLAYTEX
FAMILY PRODUCTS, INC.,
Defendants.

JOURNAL ENTRY OF
PARTIAL SUMMARY JUDGMENT

This matter came on for hearing on June 2, 1988 at 9:00 a.m. on the motion of plaintiffs St. Paul Surplus Lines Insurance Company; National Union Fire Insurance Company, International Insurance Company, Granite State Insurance Company, and AIU Insurance Company for partial summary judgment. Philip L. Bowman and Teresa J. James, Adams, Jones, Robinson and Malone, Chartered, and Bethany K. Culp, Oppenheimer, Wolff & Donnelly, appeared on behalf of the plaintiffs.

Darrell W. Warta, and Stephen Kerwick, Foulston, Siefkin, Powers & Eberhardt, and William McSherry, Spengler, Carlson, Gubar, Drodsky & Frischling appeared on behalf of the defendants International Playtex, Inc. and Playtex Family Products, Inc.

This statement of the Court's Findings of Fact and Conclusions of Law is intended to comply with the Court's responsibility pursuant to K.S.A. 60-256, 60-254, and Kansas Rules of Civil Procedure 141 and 165.

FINDINGS OF FACT

1. The plaintiffs in the action *Kelly O'Gilvie, individually, and as Administrator of the Estate of Betty L. O'Gilvie, deceased; and Stephanie L. O'Gilvie, a minor, and Ken M. O'Gilvie, a minor, By and Through Kelly O'Gilvie, their father and natural guardian v. International Playtex, Inc.* established that Betty O'Gilvie died as a result of Toxic Shock Syndrome (TSS) caused by her use of International Playtex, Inc.'s (IPI) super absorbent tampons. In the Special Verdict Form, the jury unanimously and expressly found, that:

- (a) Betty O'Gilvie's death was caused or contributed to by her use of IPI's super absorbent tampons;
- (b) IPI's super absorbent tampons were more likely to cause TSS than IPI's competitors' tampons;
- (c) the label and warning on IPI's tampon boxes failed to adequately warn users of the increased hazard assumed by usage of super absorbent tampons;
- (d) IPI knew, or should have known, at the time of decedent's death, of the increased risk of developing TSS from the use of super absorbent tampons; and
- (e) IPI's failure to warn women of this increased risk constituted a reckless disregard for the consequences of its acts.

O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987).

2. On February 11, 1988, Surplus Lines and National Union brought this action against IPI seeking a declaration that they, as IPI's insurers during the relevant policy

term, were not liable for the costs IPI incurred in its appeal of the punitive award in *O'Gilvie* or the \$10 million punitive damage award. (Petition; Affidavit of Bethany K. Culp, ¶ 2.)

3. A courtesy copy of the Petition was sent to IPI's general counsel, Joel Coleman; however, the action was not served at that time because, as a courtesy, the insurers planned to await the outcome of the Supreme Court's ruling on the Writ of Certiorari. (Affidavit of Bethany K. Culp, ¶ 2).

4. The insurers anticipated that IPI would contest jurisdiction to avoid the application of Kansas law; therefore, they also filed suit in the state court of Minnesota where the policy issued by the lead carrier, St. Paul Surplus Lines, was issued. This action has been voluntarily stayed in deference to this action. (Affidavit of Bethany K. Culp, ¶ 3.)

5. On February 23, 1988, PFP, as the successor to IPI, instituted an action against the excess insurers in the Superior Court of Delaware, New Castle County, Case No. 88C-FE-166-1-CV. (Affidavit of Bethany K. Culp, ¶ 2.) Subsequently, both parties amended their initial pleadings to encompass the same parties. (See the Amended Petition, Exhibit D to the Affidavit of Bethany K. Culp, and the Amended Complaint, Exhibit E.)

6. On March 23, 1988, PFP and IPI filed a Motion for Summary Judgment in the Delaware action, alleging that no genuine material issues of fact remained for resolution. PFP and IPI have not filed briefs or affidavits in support of their Motion. (Exhibit F to the Affidavit of Bethany K. Culp, ¶ 4.)

7. On March 28, 1988, Plaintiffs filed a Motion in Delaware requesting dismissal, or in the alternative, a stay of the Delaware proceeding so that this previously commenced Kansas action could move forward properly and expeditiously. (Affidavit of Bethany K. Culp, ¶ 4.)

8. IPI was a subsidiary of the Named Insured, Esmark, Inc. ("Esmark".) (Affidavit of Richard G. Gustafson, ¶ 8.)

9. Esmark was incorporated in 1973 to act as a holding company for the businesses formerly operated as Swift & Company. (Exhibit A to Affidavit of Richard G. Gustafson, p. 1.)

10. Swift & Company manufactured and produced food, chemicals, and personal and industrial products. (Exhibit A to Gustafson Affidavit, p. 1.)

11. During 1983, the policy year at issue in this litigation, Esmark owned more than 20 subsidiaries including: IPI; Estech, Inc.; Eschem, Inc.; STP Corporation; Estronics, Inc.; Swift & Company; KBH Holding Company; Estech Investments, Inc.; Esmark International, Inc.; MSE, Inc.; DRE Interstate Aviation; Esmark Investments, Inc.; and Risk Resources, Ltd. (Exhibit A to Gustafson Affidavit, pp. 1-4.)

12. The subsidiaries of Esmark also had subsidiaries. Estronics, Inc., one of the Esmark subsidiaries, operated through four subsidiaries: International Jensen, Inc., EESCO, Inc., Patterson Dental Company, and Custom Technologies Corporation. (Exhibit A to Richard G. Gustafson Affidavit, pp. 2-3.)

13. Estech Investments, Inc., another Esmark subsidiary, operated through three subsidiaries: ESE, Inc., Radial Credit, and Walden Lake. (Exhibit A to Richard G. Gustafson Affidavit, p. 4.)

14. In mid-1982, Esmark applied for and received comprehensive general liability coverage for itself and its subsidiaries. (Affidavit of Richard G. Gustafson, ¶ 2.)

15. During the 1982-83 policy term Esmark's principal place of business was Chicago, Illinois. The principal places of business of Esmark's various subsidiaries and their subsidiaries included: Connecticut; Illinois; Texas;

and Minnesota. (PFP's and IPI's Answer to Interrogatory No. 3, attached as Exhibit H.)

16. In the Delaware action, IPI claims that Delaware is its principal place of business; however, in other litigation IPI has taken the position that its principal place of business is Stamford, Connecticut, where its corporate headquarters are located. (Paragraph 1 of Plaintiff's Amended Complaint; Exhibit E; *International Playtex, Inc. v. Tridan Corp.*, No. 84, Civ. 5794 (S.D.N.Y. 1987) attached as Exhibit J.)

17 During the 1982-83 policy term, Esmark had gross revenues of \$3.6 billion. (Richard G. Gustafson Affidavit, ¶ 2.)

18. Esmark was one of the largest industrial manufacturing corporations in the Fortune 500. (Richard G. Gustafson Affidavit, ¶ 5.)

19. During the 1982-83 policy term, Esmark had manufacturing, distribution, and/or administrative facilities in all 50 states. (Plaintiff's Responses to Request for Admission No. 12, attached as Exhibit I.)

20. In 1983 IPI was only one of the more than 20 subsidiaries of Esmark. (Exhibit A to Richard G. Gustafson Affidavit, ¶¶ 1-4.) IPI manufactured and distributed a number of household and personal products and was subdivided into five specialty groups according to product line. (Exhibit A to Richard G. Gustafson Affidavit, p. 72.) The Family Products Division manufactured a number of products including: baby nursers, rubber gloves, and tampons. (Exhibit A to Richard G. Gustafson Affidavit, p. 72.) In 1982, IPI's revenues accounted for only 23% of Esmark's total revenue. (Exhibit A to Richard G. Gustafson Affidavit, p. 72.)

21. The sales from the Family Products Division accounted for only 4% of Esmark's total revenue. (Richard G. Gustafson Affidavit, p. 72.) The revenues from the sale of tampons reflected less than 2 % of Esmark's total revenues. (Richard G. Gustafson Affidavit, p. 72.)

22. In the Delaware action IPI has asserted that the law of the state where the tampons were manufactured should control the outcome of this dispute. (Exhibit E, ¶ 38.)

23. For the policy term October 1, 1982 through October 1, 1983, the Plaintiffs issued excess comprehensive general liability coverage to Esmark. (Exhibits to Amended Petition; Affidavit of Richard G. Gustafson, ¶ 2; Affidavit of Peter Kuchar, ¶ 2; Affidavit of George Vallone, ¶¶ 2 and 3; Affidavit of Robert Knowles, ¶¶ 2 and 3.)

24. For the policy term 1982-83, Mission provided the first excess layer of coverage. (Exhibit B to Amended Petition.)

25. Coverage for the second layer was provided on a pro rata basis by Surplus Lines and National Union, with total limits of \$15,000,000 excess of underlying coverage. (Exhibits C and D Amended Petition.) National Union, International, Granite State, and AIU shared, on a pro rata basis, the third excess layer of coverage, with total limits of \$25,000,000, excess of \$29,000,000 of applicable underlying coverage. (Exhibits E, F, and G to Amended Petition.)

26. The St. Paul Surplus Lines' Coverage was negotiated on behalf of Esmark, Inc. by Dinner, Levison & Company (Fred S. James) from its office in San Francisco, California. Dinner, Levison & Company retained John Ireland & Company in Chicago, Illinois to arrange for the placement of the excess umbrella coverage. St. Paul Surplus Lines issued its policy in St. Paul, Minnesota and delivered it to John Ireland & Company in Illinois. (Affidavit of Richard G. Gustafson, ¶ 3.)

27. The policy issued to Esmark, Inc. by AIU was negotiated and written out of the company's regional office in Chicago. The policy was then delivered to the named insured, Esmark, Inc., in Chicago, Illinois. (Affidavit of Peter Kuchar, ¶ 2.)

28. The policies issued to Esmark, Inc. by National Union and Granite State, identified in the Plaintiff's Complaint, were issued in New York and delivered to the named insured, Esmark, Inc., in the State of Illinois. (Affidavit of George Vallone, ¶ 2.)

29. The decision to contest the liability of National Union; AIU; and Granite State for the award of punitive damages in the *O'Gilvie* action was made in New York. (Affidavit of George Vallone, ¶ 3.)

30. International Insurance Company Policy No. 520-021506-6 was issued in the State of California and delivered in the State of Illinois. No negotiations between International Insurance Company and the agents or representatives of the insured under the policy occurred in the State of Delaware. (Affidavit of Robert Knowles, ¶ 2.)

31. The International Insurance Company policy was negotiated and prepared by the Company's underwriting group in San Francisco, California and was issued and delivered to the named insured, Esmark, Inc., residing in the State of Illinois. (Affidavit of Robert Knowles, ¶ 3.)

32. With certain exceptions, relating to the limits and premiums, the third layer excess policies mirrored the terms of the second layer excess policies. (Exhibits E and F of Amended Petition.)

33. The second excess layer policies followed the terms of the first layer excess policy issued by Mission. (Exhibits C and D of Amended Petition.)

34. Insuring Agreement 1A of the Mission policy incorporated the terms and conditions of the underlying policy provided by Northwestern National Insurance Company ("Northwestern"). (Exhibit B to Amended Petition.)

35. All of Esmark's policies provided coverage for bodily injury claims arising out of products manufac-

tured, sold, or distributed by the named insured and its subsidiaries. (Exhibits A-F to Amended Petition.)

36. There was no special coverage under the plaintiff's policies for claims of TSS. The Mission policy did provide for a higher self insured retention (deductible) for claims of TSS. Due to the higher retained limit applicable to claims of TSS, the insureds actually had less coverage for these claims. (Affidavit of Richard G. Gustafson, ¶ 11; Exhibit A to Amended Petition; see also the Northwestern Policy attached to the Gustafson Affidavit as Exhibit C.)

37. As of February 29, 1988, a total of 133 claims involving TSS were reported to St. Paul Surplus Lines for the policy term October 1, 1982 - October 1, 1983. These claims are the result of alleged injuries in a number of states including: California; Texas; Oregon; Florida; Oklahoma; South Carolina; North Carolina; Maryland; Iowa; Illinois; Kansas; Ohio; Louisiana; Mississippi; Missouri; Virginia; New York; West Virginia; New Jersey; Utah; Washington; Indiana; and Nebraska. (Affidavit of Kristi E. Teigen, ¶ 2.)

38. At the time the verdict in the *O'Gilvie* action was rendered, the umbrella excess carrier, Mission National Insurance Company, had not yet exhausted its limits. Mission denied coverage for the punitive award and tendered International Playtex's share of the compensatory award. International Playtex rejected the tender and pursued the appeal without receiving the consent of the second layer excess carriers. (Affidavit of Kristi E. Teigen, ¶ 5.)

39. The second layer excess carriers have denied coverage for punitive damages only in those situations where the bodily injury or death occurred in a state where punitive damages are uninsurable as a matter of public policy. (Affidavit of Philip L. Bowman.)

40. The issues relating to the liability for the punitive damage award are totally separate and apart and unrelated to the remaining issues of the case. The remaining issues can easily go forward without becoming entangled in the legal or factual issues, if there are any, relating to the liability for punitive damages on the part of the plaintiff, so I find there is no just reason to delay and I direct the entry of final judgment on that claim.

This Court has reviewed the Defendants' Responses to the Statement of Uncontroverted Facts set forth in the Plaintiffs' Motion. The Court finds that those facts which the defendants state are "Generally Uncontroverted" are admitted because the explanations and qualifications put forth by the defendants do not actually controvert the facts as stated. These qualifications and explanations are not material to this Court's decision.

As to the defendants' contravention of certain facts this Court finds the following:

Uncontroverted Fact No. 5: The Court will strike the word "purported." The Court finds that defendants have not materially disputed Uncontroverted Fact No. 5.

Uncontroverted Fact No. 16: Defendant Playtex's response on this issue is argumentative and does not directly deny Paragraph 16 asserted by plaintiffs. Defendants simply argue that a corporation can have two principal places of business, which appears to be a conclusion of law. The Court finds that the defendants have not materially controverted the facts set forth in Uncontroverted Fact No. 16.

Uncontroverted Fact No. 22: The Court finds that the defendants have not directly controverted the fact set forth in Paragraph 22; rather, defendants have listed argument, conclusions of law, and additional facts which support their argument that Delaware law should apply.

To the extent that plaintiff's Uncontroverted Fact No. 22 implies that the only basis for defendant's argument that Delaware law applies is the fact that the tampons were manufactured in Delaware, the court finds that No. 22 is successfully controverted.

Uncontroverted Fact No. 26: The Court finds that Defendants' Response does not controvert No. 26.

Uncontroverted Fact No. 32: The Court finds that the Defendants' Response is merely a paraphrase of Uncontroverted Fact No. 32.

Uncontroverted Fact No. 36: The Court finds that the Defendants' Response is merely a paraphrase of Uncontroverted Fact No. 36.

Uncontroverted Fact No. 38: The defendants contend that consent was not necessary but do not controvert the fact that no consent was obtained.

There are numerous and extensive disputes of fact with respect to the construction of the policy and the expectations of the parties. Those issues are the subject of discovery largely in the Delaware case, but also in the present action. These facts are not material to the court's decision.

CONCLUSIONS OF LAW

1. This Court concludes that it has jurisdiction of this matter and personal jurisdiction over the defendant International Playtex, Inc. and its successor, Playtex Family Products, Inc. pursuant to K.S.A. § 60-308(b) (1). In reaching this conclusion the Court expressly adopts the reasoning of the Federal District Court for the District of Illinois as set forth in *United Services Auto Association v. Cregor*, 617 F. Supp. 1053 (D. Ill. 1985), which also involved a declaratory judgment action instituted by an insurer against a nonresident insured. In adopting this reasoning this Court concludes

that this declaratory judgment action requires the Court to determine whether coverage exists for a \$10 million punitive damage award rendered against International Playtex, Inc. in the underlying suit. As such, this action for declaratory relief is one which lies in the wake of the commercial activities by which the defendants submitted to the jurisdiction of the Kansas courts. This action for declaratory relief arises from and is connected with the business transacted by defendant IPI in the State of Kansas. This Court concludes that there is a sufficient connection between the business conducted by the defendants in this state and the controversy before the Court to meet the requirements of K.S.A. § 60-308 (b) (1).

2. This Court concludes that Kansas law should apply to determine the outcome of this dispute. It is a clearly expressed public policy of the State of Kansas that punitive damages for direct liability cannot be insured against. The punitive damage award in the *O'Gilvie* action was not based upon vicarious liability. So, even under Kansas law enacted after the actions giving rise to the award in the *O'Gilvie* decision, defendants could not recover their punitive damages from plaintiffs. This controversy arises out of injuries in Kansas suffered by a Kansas resident resulting in her wrongful death. Providing for the award of punitive damages in civil actions is a significant method by which this state protects its citizens. This state's interest in protecting its citizens and its duty to protect its citizens is of the highest order. This interest would be undermined if Kansas law were not applied to the question presented in this action.

3. It is against the public policy of the state of Kansas to allow the defendants to pass on the costs of a punitive damage award based upon IPI's direct liability to the plaintiffs. Therefore, plaintiffs are entitled to the relief requested in Paragraph 39 of their Amended Petition, that they are not obligated to indemnify the defendants for

the punitive damage award which was assessed by a Kansas jury against International Playtex, Inc. in the action, *Kelly M. O'Gilvie, individually, and as Administrator of the Estate of Betty O'Gilvie, deceased; and Stephanie L. O'Gilvie, a minor, and Kevin M. O'Gilvie, a minor, by and through Kelly M. O'Gilvie, their father and natural guardian v. International Playtex, Inc.*, Case No. 83-1846-K.

4. PFP and IPI made an oral motion to withdraw their counterclaim and plaintiffs opposed the motion. The court denies defendants' motion to withdraw the counterclaim. The court does not decide or make any conclusion of law with respect to whether this was a compulsory counterclaim, contingent counterclaim or whether it is a counterclaim at all.

WHEREUPON, counsel for plaintiffs requests certification of the Court's ruling as a final judgment pursuant to K.S.A. 60-254;

WHEREUPON, counsel for defendants objects to plaintiffs' request for certification and requests time to brief and make argument on that issue at a separate hearing;

WHEREUPON, the Court denies defendants' request for briefs, argument and a separate hearing on the issue of whether a final judgment should be entered.

THEREUPON, the Court overrules defendants' objection to entering judgment, and concludes pursuant to K.S.A. 60-254 that there is no just reason to delay entry of judgment on plaintiffs' claim in Paragraph 39 of their Amended Petition.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion For Partial Summary Judgment is sustained. This Court accordingly declares that plaintiffs are not obligated to indemnify defendant International Playtex, Inc. for the punitive damage award in the *O'Gilvie* action.

2. This Court expressly determines that there is no just reason for delay in entering a final judgment as set forth above and hereby expressly directs entry of final judgment as such.

/s/ Nicholas W. Klein
The HONORABLE NICHOLAS KLEIN

Approved:

ADAMS, JONES, ROBINSON AND MALONE,
CHARTERED

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APPENDIX C

SUPREME COURT,)
) ss.
 STATE OF KANSAS,)

Dist. Court No. 88 C 463

No. 88-62795-AS

[Filed Aug. 15, 1989]

The State of Kansas, to the District Court within and for
 the County of Sedgwick in the State of Kansas,
 Greeting:

WHEREAS, In a certain civil action lately pending
 before you, wherein St. Paul Surplus Lines Insurance
 Company, et al., plaintiffs, and International Playtex, Inc.,
 et al., defendants, a judgment was rendered by you
 against the said Defendants from which judgment said
 Defendants prosecuted an appeal in the Supreme Court
 within and for the State of Kansas;

AND WHEREAS, at the April Session of the January
 Term of said Supreme Court, A.D. 1989, on consideration
 of the said appeal it was ordered and adjudged by the
 said Supreme Court that the judgment of the District
 Court be Affirmed, attested true copy opinion attached
 and that the said ———— recover against the said ———
 Dollars for ———— costs herein expended and have
 execution therefor.

YOU ARE THEREFORE COMMANDED, That without delay
 you cause execution to be had of the said judgment of
 the Supreme Court, according to law.

Costs

Fees of Clerk Supreme Court . . .	\$ Paid
Record	_____
Transcript	_____
Other costs	_____
Total	\$_____

WITNESS my hand and the seal of said
 Supreme Court affixed hereto, at my office,
 in the City of Topeka, on the Aug. 14,
 1989 day of _____ A.D. 19—.

/s/ Lewis C. Carter
 LEWIS C. CARTER
Clerk of the Supreme Court

Mandate Received by Clerk
 Trial Judge Notified Date: _____